IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No.

[C113-198]
UNITED STATES OF AMERICA, *Respondent*,
v.
FERDINAND A. KERTESS and CHEMICAL MARKETING COMPANY, INCORPORATED, *Defendants*.

FERDINAND A. KERTESS, *Petitioner*.

[C113-199]
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(CONSOLIDATED APPEALS)

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, FERDINAND A. KERTESS, respectfully prays that Writs of Certiorari issue to review the judg-

ments of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled cases on January 25, 1944 (R. 429-432), affirming four judgments of conviction in a criminal case in the United States District Court for the Southern District of New York, entered July 2, 1943 (R. 396-7), which said actions were consolidated for purposes of trial (R. 22) and for purposes of appeal (R. 412).

Questions Presented

The questions presented are:

1. Do the Export Control Laws (Act of July 2, 1940, 54 Stat. 714, 50 U. S. C. A. Appendix Sec. 701; Presidential Proclamation No. 2413, 5 Fed. Reg. 2467, 2469) authorize the promulgation of restrictions on exports to particular areas and the licensing of particular individuals to take part in export transactions, or, is it intended that only the materials specifically designated as essential for defense purposes are subject to license? When a license permitting the export of certain materials is duly issued to one person, who, for any reason, is unable to make the export, is it illegal for another person to complete the export shipment of the same materials embraced by the license?

2. Is it proper to permit a jury to presume the existence of the *corpus delicti* in a criminal case?

3. To what extent does the law require that an extrajudicial admission or confession, made after the commission of a Federal crime, be corroborated? Is it legally essential that the *corpus delicti* be established by substantial evidence independent of the admission or confession, as Federal Courts in some circuits hold, or, is it sufficient

if the corroboration tends merely to touch upon or support the admission or confession, as Federal Courts in other circuits hold?

4. What corroboration is required to support an admission or confession of some, but not all, of the elements of a Federal crime? If there is an admission or confession, relating to suspicious or incriminating facts which, of themselves, do not include the *corpus delicti* and the corroborating evidence merely supports such admission or confession, has the commission of a Federal crime been legally established?

5. Is a conviction proper if it is based upon an admission or confession corroborated by circumstantial evidence, which considered together, can be reconciled either with the hypothesis of guilt or innocence?

Statement

The petitioner, Ferdinand A. Kertess, was tried and convicted by a jury on four separate indictments, two of which charged the substantive crimes of exporting platinum-group metals without licenses in violation of the Export Control Laws (Title 50, U. S. C. A. Appendix § 701; Presidential Proclamation 2413, 5 Fed. Reg. 2467), and two of which charged conspiracy with named and unnamed defendants to export such metals in violation of the Federal Conspiracy Statute, Title 18, U. S. C. A. § 88.

The facts are discussed at length in the opinion below, and are only briefly referred to here. On July 2, 1940, the President, acting under the powers delegated to him by Congress (50 U. S. C. A. Appendix Sec. 701), issued a proclamation (Presidential Proclamation 2413, 5 Fed. Reg. 2467), establishing rules and regulations governing the ex-

port of certain materials in the interests of national defense, in which he prohibited the export *inter alia*, of platinum-group metals, except when authorized in each case by a license obtained from the Secretary of State. The regulations set forth in detail the procedure by which licenses were to be issued (5 Fed. Reg. 2469).

Petitioner was the sole stockholder of Chemical Marketing Co., Inc., a New York corporation engaged in the business of buying, selling and manufacturing chemicals. Acting for the interests of certain European customers (R. 293-294, Exhibits 23-25), he made arrangements and initiated proceedings, in which he remained undisclosed, to procure export licenses in the name of another for the shipment of fifteen (15) ounces of iridium, fifteen (15) ounces of rhodium and one hundred fifty (150) ounces of palladium, all platinum group metals, to a party named Barth, in Cali, Colombia. The applications were granted and licenses were duly issued by the State Department (R. 313-323). Subsequently, when the named licensee indicated his financial inability to purchase the said metals for export, the petitioner intervened, took posession of the licenses, purchased the metals and completed the export shipment. When the consignment reached Cali, Colombia, it was immediately forwarded to Santiago, Chile, and from thence to Rome, Italy. Upon the basis of these facts the petitioner was indicted and charged with the substantive crime of exporting platinum-group metals without licenses in violation of the Export Control Laws (R. 12) and with conspiracy to make such exportation (R. 13-16). For convenient reference, this transaction is referred to as the "Barth Transaction."

With respect to the other two indictments, referred to as the "Mueller Transaction," it appears that petitioner had purchased sixty ounces of rhodium, a platinum group

metal for his European customers before any restrictions on exports were in effect (R. 342-345). He exported this metal to Japan, but it was returned to him because of certain Japanese import restrictions. In the interim, the Export Control Laws were enacted and petitioner was obliged to keep the rhodium in his custody. On March 24, 1941, he was visited by a Mrs. Betty Mueller, who presented a letter of identification to him from his European customers, which directed him to deliver thirty-five of the sixty ounces of rhodium to her for special delivery (R. 352-3). This metal was delivered to her in New York City and she gave petitioner a receipt therefor (Exhibit 90, R. 350). Two days later, on March 26, 1941, Mrs. Mueller sailed as a passenger from New York on the S.S. "Magallanes" for Balboa, Spain. There is no oral or written proof that she had the thirty-five ounces of rhodium that was given to her by the petitioner when she sailed on that boat. In June, 1942, at the request of a Federal Internal Revenue agent who was auditing the books of petitioner's corporation, Chemical Marketing Company, Inc., in connection with income tax problems, petitioner made voluntary statements under oath explaining the circumstances by which he became possessed of the aforesaid sixty ounces of rhodium metal and the disposition that he made by delivery of the thirty-five ounces to Mrs. Mueller (R. 211-213, 352-353). These facts form the basis for petitioner's indictment on the charge of having committed the substantive offense of exporting thirty-five ounces of rhodium without a license in violation of the Export Control Laws (R. 17) and conspiracy to make such exportation (R. 18-20).

The petitioner was tried and found guilty on all four indictments and judgments were entered fining him the sum of $1,000 on each indictment and sentencing him to eighteen months' imprisonment on each indictment, the sentences

to run consecutively. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the four judgments of conviction were affirmed.

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the judgments of conviction.

2. In holding that the exportation to Barth, at Cali, Colombia, was unlicensed and constituted a violation of the Export Control Laws.

3. In holding that the evidence was legally sufficient to establish a conspiracy to make an unlicensed export to Barth at Cali, Colombia.

4. In holding that there was ample evidence from which a jury could infer the *corpus delicti*, exportation without a license, on the charge of exportation to the Continent of Europe in the "Mueller transaction."

5. In holding that the evidence was legally sufficient to establish a conspiracy to export to the Continent of Europe without a license in the "Mueller transaction."

6. In holding that the extra-judicial declarations or admissions of the petitioner were sufficiently corroborated by other evidence.

7. In holding that the *corpus delicti* was sufficiently established by the other evidence.

Reasons for the Allowance of the Writs

1. The nature, scope and purpose of the Export Control Laws, Act of July 2, 1940, 54 Stat. 714; Presidential Proclamation 2413, 50 U. S. C. A. Appendix Sec. 701, 5 Fed.

Reg. 2467, 2469, which prohibit the unlicensed exportation of certain materials, never have been, to the knowledge of petitioner, interpreted or construed in this Court. These laws concern matters of national importance and the decision below construes them in a manner which is inconsistent with the reasons underlying their enactment.

2. It has been fairly settled in Federal Courts that extra-judicial declarations, admissions or confessions must be corroborated by other evidence, but it is not clear or settled as to what extent the corroborative proof must go. Some Federal Courts hold that extra-judicial confessions or admissions are not sufficient to authorize a conviction unless corroborated by independent evidence of the *corpus delicti*. *Pines* v. *U. S.* (C. C. A. 8), 123 F. (2d) 825; *Evans* v. *U. S.* (C. C. A. 10), 122 F. (2d) 461; *Gulotta* v. *U. S.* (C. C. A. 8), 113 F. (2d) 683; *Gregg* v. *U. S.* (C. C. A. 8), 113 F. (2d) 691; *Forte* v. *U. S.* (App. D. C.), 94 F. (2d) 236; *Ercoli* v. *U. S.*, 131 F. (2d) 354 (App. D. C.); *Tingle* v. *U. S.* (C. C. A. 8), 38 F. (2d) 573; *Wagner* v. *U. S.* (C. C. A. 8), 8 F. (2d) 581; *Martin* v. *U. S.* (C. C. A. 8), 264 F. 950; *Naftzger* v. *U. S.* (C. C. A. 8), 200 F. 494, whereas other Federal Courts hold that the corroborative evidence need not independently establish the *corpus delicti*, but any corroborating circumstances will suffice which merely touch upon the *corpus delicti* or, as some decisions hold, such corroborative proof which, in the Judge's opinion, will go to fortify the truth of the confession itself; *Anderson* v. *U. S.* (C. C. A. 6), 124 F. (2d) 58; *Jordan* v. *U. S.* (C. C. A. 4), 60 F. (2d) 4, certiorari denied, 287 U. S. 633; *Wynkoop* v. *U. S.* (C. C. A. 9), 22 F. (2d) 799; *Pearlman* v. *U. S.* (C. C. A. 9), 10 F. (2d) 460; *Daeche* v. *U. S.* (C. C. A. 2), 250 F. 566; *Bolland* v. *U. S.* (C. C. A. 4), 238 F. 529; *Flower* v. *U. S.* (C. C. A. 5), 116 F. 241; *Cohen* v. *U. S.* (C. C. A. 2), 288 F. 835; *U. S.* v. *Williams*, 1 Cliff. 5, 28, Fed. Cas. No. 16,707. An excellent discussion and review of many of

these decisions is to be found in the case of *Forte* v. *United States* (68 App. D. C. 111), 94 F. (2d) 236. In *Warszower* v. *U. S.*, 312 U. S. 342, 347, this Court stated that the rule as to the corroboration of confessions applies only to extra-judicial admissions made after the commission of a crime, but left unsettled the extent to which such corroboration should go. The Court below refers to this phase of the opinion of the *Warszower* case as dictum, and not necessarily applicable to admissions voluntarily made before the accused has been charged with crime (R. 426).

The uncertainty reflected by the conflicting rules in the several circuits on this question and the related question of whether the jury may properly infer the existence of the *corpus delicti* in a criminal case where the circumstantial evidence is remote and speculative, invites consideration by this Court to the end that the law may be clarified and settled for all the circuits.

WHEREFORE, petitioner respectfully prays that Writs of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in this case; and that the judgments and orders of said Circuit Court of Appeals may be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

FERDINAND A. KERTESS,
Petitioner.

EDWARD V. BRODERICK,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Circuit Court of Appeals is not yet officially reported and is printed in the record at pages 416 to 428.

Jurisdiction

The judgments of the United States Circuit Court of Appeals were rendered on January 25, 1944 (R. 429-432). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), U. S. Code, Title 28, Section 347, and by Sections 687, 688, U. S. Code, Title 18. This petition is filed within thirty days from the date of the judgments of conviction in the Circuit Court in accordance with the provisions of Rule 11 of the Rules of Practice and Procedure in criminal cases after plea of guilty, verdict or finding of guilt.

Statutes Involved

The Act of July 2, 1940, Chap. 508, Sec. 6, 54 Stat. 714, in so far as material, provided:

> "Sec. 6. Whenever the President determines that it is necessary in the interest of National Defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in

the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment."

Proclamation No. 2413 was promulgated by the President under authority of the Act of July 2, 1940, and its pertinent provisions provide as follows:

"* * * I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the said Act of Congress, do hereby proclaim that the administration of the provisions of Section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of national defense.

AND I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the National Defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license as hereinafter provided:

2. The following basic materials and products containing the same:

q. Platinum group metals.

AND I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby

authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control. • • •"

Title 18, Sec. 88, U. S. C. A., provides:

"Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both."

ARGUMENT

POINT I

The decision of the Circuit Court below with respect to the "Barth Transaction" is based upon an erroneous interpretation and application of the Export Control Law.

A. The Substantive Offense

The decision of the Circuit Court below, as gathered from its opinion, is based upon the conclusion that, "The regulations plainly contemplated that a license was to be issued only to the particular person named in the application; the licenses were not transferable nor were they transferred. Neither defendant nor his company, Chemical Marketing Company, were named in the licenses, those

names having been intentionally and deliberately withheld in the applications. The defendant, having exported without licenses, violated the President's regulations and therefore violated 50 U. S. C. A. Appendix Sec. 701. The conviction for this exportation was proper (R. 420)." This interpretation of the regulations is repugnant to the spirit and intent of the law.[1]

The plainly expressed purpose of the Act of July 2, 1940 is to prevent the export of certain strategic materials "in the interest of national defense." The United States was not at war with any nation at the time this Act was passed and it should therefore be construed in the light of conditions then prevailing, unaffected by our subsequent entry into the conflict. It does not appear from the language of the Statute that the restrictions against unlicensed export of essential materials were directed against any particular individual, country or continent; nor does the Act contemplate the licensing of one individual as against another to take part in an export transaction, as the lower Court seems to hold. The power granted under the Act to the President, or such other authorities duly designated by him, authorizing him to prohibit or curtail the exportation of any materials, is limited to the extent that he is first required to determine that such materials are necessary for national defense. It is clear that in the absence of such determination, such materials can legally be exported without a license. There is no support for the assumption of power to consider, as the basis for any determination, the nature of the shipper or the ultimate destination of the materials. The sole controlling factor is the national need

1. Primarily, in the construction of a statute it is essential to ascertain and give effect to the intent of the legislative body. *Darby-Lynde Co.* v. *Alexander*, 51 F. (2d) 56; *Stevens* v. *Nave-McCord Merc. Co.*, 150 F. 71, 75; *Balanced Rock S. A.* v. *Manitou*, 38 F. (2d) 28, 30; *Moffat Tunnel Imp. Dist.* v. *Denver etc.*, 45 F. (2d) 715, 723.

of such material. It is reasonable to assume that if Congress intended to vest the President with power to prevent export by any particular individual or to any particular country or continent, it would have made specific provision therefor, as it did when it delegated to the President the power to name foreign states and define combat areas under the Neutrality Act of Nov. 4, 1939 (50 Stat. 4). It is not without significance that such power was not specifically delegated to the President under the Act of July 2, 1940.

The punishable offense under the Law is unlicensed exportation of essential materials, and, when the proper authority determines that certain materials are not essential for national defense and issues a license permitting the export thereof, the subsequent act of exportation cannot reasonably be construed as a violation of the Law, no matter who participates therein. Statutes which create and define crimes are strictly construed and their scope is not to be extended by intendment because the Court thinks the lawmaking body should have made them more comprehensive. *Fasulo* v. *U. S.*, 272 U. S. 620, 628; *U. S.* v. *Resnick*, 299 U. S. 207, 209; *Mercantile Commercial Bank & Trust Co.* v. *Howe*, 113 F. (2d) 891, 893. There is no question that export licenses for shipment of strategic materials to Barth in Cali, Colombia, were duly issued by the State Department (Exhibits 48-49, R. 313-322); that the materials mentioned and described in those licenses were the same materials exported; that the licenses accompanied the shipment and were subsequently returned to the State Department in Washington, D. C., after such exportation (R. 105). It is also true that the licenses were issued to Western Commercial Company and not to petitioner; that the licensee did nothing further after the licenses issued; that the licenses were never transferred or assigned; and the petitioner ac-

tively completed the exportation. The grant of the licenses by the State Department presents unassailable proof that the materials were not required or essential to the interests of national defense and inasmuch as the materials that were exported were embraced by the licenses, the act of the exportation cannot be regarded as unlicensed or a violation of the spirit or letter of the law.

B. The Conspiracy Offense

The conspiracy indictment is based mainly on the same facts involved in the substantive offense charged by the indictment in the "Barth Transaction." It follows that if the acts established in connection with the substantive offense did not constitute a violation of the Export Control Laws, then any concert of action or agreement to perform those acts cannot be construed as illegal. In any event the proof reasonably construed clearly demonstrates petitioner's intent to comply with the licensing requirements of the law (R. 292-3; R. 254, fol. 762). The conspiracy charge is not supported by the evidence which fails to show the existence of any agreement or concert of action with any of the individuals or firms named as co-conspirators in the indictment. The Circuit Court is in apparent accord with this view because the only support it can find for the conspiracy charge is derived from the acts of one Heemsoth, who was neither accused or charged with being a conspirator by anyone (R. 24). Heemsoth, a custom house broker and freight forwarder, was engaged by petitioner to procure export licenses, and he cannot be regarded as a conspirator when the proof unequivocally shows that his only participation in the matter was connected with the procurement of those licenses (R. 296, 305, 307). Had the named licensee actually shipped the merchandise, whether as a dummy or otherwise, there is very little likelihood that

there would have been any charge of an unlawful conspiracy. Moreover, neither Heemsoth or any of the other co-conspirators could have had any previous knowledge that the named licensee would be unable to consummate the export or that the petitioner would proceed to use such licenses. Whatever steps were taken to effect the export were the sole acts of the petitioner, who was the only one who can be held responsible, if such acts constitute a violation of the law. Obviously, the petitioner could not conspire with himself. *Bartkus* v. *United States* (7 C. C. A.), 21 F. (2d) 425; *Union Pacific Coal Co.* v. *United States* (C. C. A. 8), 173 Fed. 737. There is nothing in the proof which justifies the conclusion that the proof established an illegal conspiracy.

POINT II

The decision of the Circuit Court concerning the "Mueller Transaction" is based on an erroneous application of the rules applicable to extra-judicial admissions and proof of the *corpus delicti*.

A. The Substantive Offense

Motions for a directed verdict on the ground that the evidence failed to establish that the thirty-five ounces of rhodium were actually exported from the United States were denied primarily on the Government's contention that exportation could be inferred from admissions consisting of entries on the books of account of the Chemical Marketing Company showing payment by petitioner's foreign customers (R. 257-8) for the 35 ounces of rhodium. The Circuit Court sustained the lower Court on this point holding that the jury could infer from the circumstances adduced

that Betty Mueller had the rhodium in her possession when she sailed (R. 425, footnote 4). In other words the jury was permitted to speculate and assume from remote circumstances that a crime had been committed. These rulings are in direct conflict with applicable decisions in the Eighth Circuit which hold that the *corpus delicti* cannot be presumed, but must be proven. *Wagner* v. *U. S.* (C. C. A. 8), 8 F. (2d) 581, 586; *Pines* v. *U. S.* (C. C. A. 8), 123 F. (2d) 825. In the latter case, where the defendant was charged with transporting spurious instruments in interstate commerce it was held:

> Page 829: "The gist of the offense, however, is the transportation of these described spurious instruments in interstate commerce. Having them in possession or even attempting to pass them as genuine was not a Federal offense under this statute. It was therefore of vital importance to prove that the instruments were transported or caused to be transported by someone in interstate commerce. This, being the *corpus delicti*, could not be presumed nor could it be established by extra-judicial declaration, confession or admission of the defendant."

It is fundamental that no conviction can properly be had unless the prosecution establishes the fact that a crime has been committed and, while it is true that the *corpus delicti* may be proven by circumstantial evidence, such proof must nevertheless be strong, cogent and exclude every other hypothesis except that of guilt of the accused. *Vernon* v. *U. S.* (C. C. A. 8), 146 F. 121. The *corpus delicti* of the crime charged under the indictment in the "Mueller Transaction" is the unlicensed exportation of thirty-five ounces of rhodium, and it was incumbent upon the prosecution to establish this fact. The record is devoid of any direct or cogent circumstantial proof from which it may be reasonably concluded that this rhodium was in fact exported. At

most the proof discloses some suspicious circumstances which are inconclusive to establish the essential fact to be proven. The delivery of the rhodium to Mrs. Mueller did not constitute a crime and the fact that the books of petitioner's company reflect payment for such delivery is consistent with a sale thereof in the United States. The circumstances relied on are too remote to permit speculation and conjecture on the question of whether there was a subsequent exportation. It is significant that no proof was adduced to show that Mrs. Mueller had continuous possession of the rhodium from the time of its delivery to her until the time of her departure, that it was in her possession immediately prior to, or at the time that she sailed, that she had it in her possession upon arrival at her destination, or that it was delivered to or observed in the possession of any of petitioner's European customers. Furthermore there is no evidence, written or oral, of any statements or admissions by the petitioner or Mrs. Mueller that they contemplated or intended delivery of the rhodium outside the boundaries of the United States. Proof of facts such as these might possibly be regarded as proper circumstantial evidence upon which to predicate a determination that the rhodium was in fact exported.

The Circuit Court recognizes the conflict in the rules bearing upon corroboration of extra-judicial confessions, but holds that the evidence in the case amply corroborates the petitioner's affidavit irrespective of which rule is followed. Despite this statement, however, it is quite apparent that the Court followed the rule prevailing in those circuits which hold that any corroboration which supports the admission or merely touches upon the *corpus delicti* is sufficient, inasmuch as it applies the corroboration evidence to the support of petitioner's affidavit (R. 426). The inherent weakness of this rule is more apparent when

it is considered that the declarations of the petitioner contain no admission that the rhodium delivered to Mrs. Mueller was exported or that it was intended for export. Proof of that fact is the *sine qua non* of the crime to be established. There can be no doubt that considerations such as these were the factors impelling other circuits to adopt a stricter rule requiring that corroboration of extra-judicial admissions include substantial proof of the *corpus delicti*. In *Forte* v. *U. S.* (App. D. C.), 94 F. (2d) 236, it was stated:

> "* * * We feel bound * * * to follow in adopting a rule for this jurisdiction the rule of the great majority of courts in the United States that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence of the *corpus delicti* and the whole thereof."

There are numerous decisions in other circuits which support the foregoing decision. *Pines* v. *U. S.* (C. C. A. 8), 123 F. (2d) 825; *Evans* v. *U. S.* (C. C. A. 10), 122 F. (2d) 461; *Galotta* v. *U. S.* (C. C. A. 8), 113 F. (2d) 683; *Gregg* v. *U. S.* (C. C. A. 8), 113 F. (2d) 691; *Ercoli* v. *U. S.*, 131 F. (2d) 354 (App. D. C.); *Tingle* v. *U. S.* (C. C. A. 8), 38 F. (2d) 573; *Wagner* v. *U. S.* (C. C. A. 8), 8 F. (2d) 581; *Martin* v. *U. S.* (C. C. A. 8), 264 F. 950; *Naftzger* v. *U. S.* (C. C. A. 8), 200 F. 494.

The rule which requires establishment of the *corpus delicti* by cogent and convincing proof, in order to justify a conviction, bears a relationship to the rule requiring corroboration of extra-judicial confessions by extrinsic evidence of the *corpus delicti*. In both cases proof of the crime

must be clearly established to support a conviction, although in the latter case the corroborative proof need not establish this beyond a reasonable doubt. Nonetheless, the corroborative evidence together with the extra-judicial confession must establish the crime beyond a reasonable doubt. Those circuits which follow the rule that the corroboration need only support the confession or admission have overlooked the fact that in many cases, such as the one under consideration, admissions do not always contain all of the elements of a crime, and to accept corroborative proof of the admissions as sufficient, is a flagrant misapplication of the rule which requires proof of the *corpus delicti*. Whichever is the better rule, the conflict should be settled by this Court.

B. The Conspiracy Offense

It is needless to cite authorities to support the well-settled legal concept that the essence of a conspiracy is an unlawful agreement or combination to commit a public offense. It is equally well established that one does not conspire with himself or his own corporation. *Union Pacific Coal Co.* v. *United States* (C. C. A. 8), 173 Fed. 737; *Bartkus* v. *United States* (7 C. C. A.), 21 F. (2d) 425. It is not so clear, however, what particular acts involve persons as co-conspirators. The Circuit Court below concludes that petitioner's lively participation in the "Barth Transaction" (R. 425) and his attempts to export to Japan and Mexico present some proof of conspiracy justifying submission of the question to the jury. It will be well to recollect, however, that at the time petitioner purchased the rhodium, and later exported it to Japan, no export control laws were in effect. Obviously there could be no common understanding or agreement to violate a non-existent law. In fact the repeated efforts to obtain export licenses after the law

went into effect belies the existence of any unlawful combination. Even if it were to be assumed that petitioner had knowledge of the fact that Mrs. Mueller intended to carry the rhodium outside the boundaries of the United States, such knowledge could not involve him as a participant in a crime. *United States* v. *Falcone* (C. C. A. 2), 109 F. (2d) 579, affirmed 311 U. S. 199; *Moss* v. *United States* (C. C. A. 6), 132 F. (2d) 875; *Direct Sales Co.* v. *United States*, 319 U. S. 703. The evidence from which the jury was permitted to infer the existence of a conspiracy were petitioner's own extra-judicial admissions which do not establish the *corpus delicti*. In *Tingle* v. *United States*, 33 F. (2d) 573, 575, the defendant was charged with conspiring with others to manufacture and sell intoxicating liquor for use in such manufacture. He signed statements admitting that he had leased a warehouse for a brewery and was aware of the purposes for which it was to be used. The Court ruled:

> "But in conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the *corpus delicti* charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that, 'extra-Judicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the *corpus delicti*.' *Martin* v. *United States* (C. C. A. 8), 264 F. 950. This has been the consistent holding of this court, in harmony with uniform decisions in other jurisdictions. *Naftzger* v. *United States* (C. C. A.), 200 F. 494; *Goff* v. *United States* (C. C. A.), 257 F. 294; *Turinetti* v. *United States*

(C. C. A.), 2 F. (2d) 15. It is necessary, then, to determine whether there is in the record before us any substantial independent evidence of the *corpus delicti*, that is, the conspiracy charged, tending to corroborate the extrajudicial statements and admissions of appellant."

The inference of an unlawful agreement was neither justified or warranted by the proof. *Linde* v. *United States* (C. C. A. 8), 13 F. (2d) 59; *Dahly* v. *United States* (C. C. A. 8), 50 F. (2d) 37; *Goodman* v. *United States*, 128 F. (2d) 854.

Conclusion

The petition for Writs of Certiorari should be granted in order that this Court may clarify and interpret the scope and nature of the Export Control Laws and settle the apparent conflict in the rule concerning the corroboration of extra-judicial admissions or confessions.

Respectfully submitted,

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Attorney for Petitioner.

Nos. 730-738

In the Supreme Court of the United States

OCTOBER TERM, 1941

FERDINAND A. KIRCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1943

Nos. 730–733

FERDINAND A. KERTESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 416–428) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered on January 25, 1944 (R. 429–432). The petition for writs of certiorari was filed on February 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Rules

of Criminal Procedure promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether exportation of "platinum group" metals under another's license, procured from the Secretary of State by false representations as to the seller and the destination of the metals, is a violation of Section 6 of the Act of July 2, 1940, 54 Stat. 712 (50 U. S. C. App. 701).

2. Whether the evidence was sufficient to sustain petitioner's convictions.

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Act of July 2, 1940, 54 Stat. 712 (50 U. S. C. App. 701), in pertinent part provides:

> Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than

> $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.[1] * * *

Proclamation No. 2413 (5 Fed. Reg. 2467) promulgated by the President on July 2, 1940, pursuant to the Act of July 2, 1940, provides in part:

> Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of Congress, do hereby proclaim that the administration of the provisions of section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of national defense.
>
> And I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license as hereinafter provided:
>
> * * * * *
>
> 2. The following basic materials and products containing the same:
>
> * * * * *

[1] On June 30, 1942, the statute was amended in respects not here material (c. 461, 56 Stat. 463; 50 U. S. C. App., 1942 Supp., 701).

q. Platinum group metals.

* * * * *

And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control.

* * * * *

The Regulations prescribed by the President on July 2, 1940 (5 Fed. Reg. 2469), governing the exportation of articles and materials designated in the proclamation, provide in pertinent part:

* * * I hereby prescribe the following regulations to govern the exportation of:

* * * * *

q. Platinum Group Metals.

* * * * *

2. None of the articles or materials listed above shall be exported unless a license authorizing such export has been issued by the Secretary of State. * * *

3. The Secretary of State will issue export licenses to authorize proposed

shipments of the said articles and materials * * * when I have determined that the proposed exportation would not be detrimental to the interests of the national defense.

* * * * *

6. Export licenses are not transferable and are subject to revocation without notice. If not revoked, licenses are valid for one year from the date of issuance.

* * * * *

9. The country designated on the application for license as the country of destination shall in each case be the country of ultimate destination. If the goods to be exported are consigned to one country with the intention that they be transshipped thence to another country, the latter country shall be named as the country of destination.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Four separate indictments (R. 12–20) were returned, in the District Court of the United States

for the Southern District of New York, charging petitioner with two separate violations of, and with having entered into two separate conspiracies to violate, Section 6 of the Act of July 2, 1940 (*supra*, pp. 2–3) and the Executive Proclamation and regulations issued thereunder (*supra*, pp. 3–5). All four indictments are concerned with the exportation, without an export license, of one or more of the metals known as rhodium, iridium, and palladium.[2] The Chemical Marketing Company, Inc., all of whose shares were owned by petitioner at the time of the transactions charged, was named as a codefendant in all of the indictments; and it has entered pleas of *nolo contendere*[3] and has been fined $2,500 on each indictment (R. 4–11, 285–288). The first of the conspiracy indictments (R. 13–16) named as additional defendants Theodore C. Barth, of Cali, Colombia, Deutsche Gold und Silber Scheideanstalt, a Ger-

[2] All of these metals are "platinum-group" metals (R. 86). Rhodium is used in wartime primarily in the form of platinum-rhodium catalyst for the manufacture of nitric acid, which in turn, is used in the manufacture of explosives. Iridium is used primarily in electric contact points for motors. Palladium is used as a catalyst in various hydrogenation processes. (R. 134–135.) Since July 2, 1940, when the export control program became effective, no licenses permitting the exportation of these metals to Axis countries have been issued (R. 91).

[3] The circumstances under which the *nolo* pleas were entered, following the vesting of the corporation's shares in the Alien Property Custodian, were before this Court in *Kertess* v. *United States*, No. 1029, last Term, certiorari denied, 319 U. S. 773.

man corporation, and Leukon A. G., a Swiss corporation. Of these Barth was the only one not named in the second conspiracy indictment (R. 18–20), which also named as defendants one Betty Mueller, alias Anna Babette Mueller, one Herbert Lickfett, and G. Siebert G. m. b. H., a German corporation. None of these parties being within the jurisdiction of the court, petitioner went to trial alone, after a consolidation of the four indictments for trial (R. 22). He was found guilty by the jury on each indictment (R. 5, 7, 9, 11, 281) and was sentenced on each to a $1,000 fine and to eighteen months' imprisonment, the sentences to run consecutively (R. 5, 7, 9, 11, 396). Upon consolidated appeals to the Circuit Court of Appeals for the Second Circuit, the judgments of conviction were unanimously affirmed (R. 416–432). The evidence of the transactions charged in the indictments may be summarized as follows:

A. *The Barth transaction.*—The circumstances upon which the first substantive and the first conspiracy indictment (R. 12–16) were predicated were designated by the court below as the "Barth transaction." Petitioner, in addition to being the president and sole shareholder of the Chemical Marketing Company, Inc., was the New York representative of Deutsche Gold und Silber Scheideanstalt (R. 220, Gov. Ex. 67, R. 338–339), with which G. Siebert G. m. b. H., another German corporation, and Leukon A. G., a Swiss corpora-

tion, were affiliated (see R. 135–136, 138–139, 220, 221–222, 224). On October 22, 1940, Leukon A. G. cabled petitioner from Switzerland for quotations on 15 ounces of rhodium, 15 ounces of iridium, and 150 ounces of palladium, with delivery to be made to Barth in Colombia (R. 294). The same day petitioner replied that he had informed Barth, and on October 29 he cabled Leukon the requested quotations, asking payment by cable to the Irving Trust Company (R. 295). Leukon A. G. promptly paid in advance, on October 31 (R. 297); and on that day a sale of the metals to Leukon A. G. was entered on the books of Chemical Marketing Company (R. 221), although the metals in question had not yet been procured by the latter or by petitioner.

In the meantime petitioner had discussed with the government witness Heemsoth, a customs broker, the contemplated shipment of the metals to Barth in Colombia. He asked Heemsoth to make arrangements whereby applications for export licenses would be made by Paul Gross, in the name of Western Commercial Company of which he was president, and whereby Gross was to be furnished with money with which to buy and ship the metals in the name of Western Commercial, which was to receive payment for them, all to the end that petitioner would not appear in the transaction. (R. 59–61, 176–181.) Pursuant thereto export licenses, covering 15 ounces of rhodium, 15 ounces of iridium, and 150 ounces of palladium, were procured in the name of Western Commer-

cial (R. 61–64, Gov. Ex. 48, R. 313–322). The applications for the licenses stated that Western Commercial was the consignor and seller, that the purchaser was Barth of Colombia, and that the licenses were to be sent to Heemsoth (Gov. Ex. 48, R. 313–317; Gov. Ex. 49, R. 318–322; see also Gov. Ex. 50, R. 323). The licenses were dated October 23, 1940, purported to authorize export only by the applicant, and expressly provided that they were not transferable (R. 316, 317, 321).

Thereafter Gross and Western Commercial withdrew from the arrangement whereby the latter was to purchase the metals and act as shipper, apparently because the necessary funds had not been placed at their disposal (R. 64, 71). Petitioner purchased the metals directly (see R. 75–76, 79, 80–81, 83–85; Gov. Ex. 31, R. 298; Gov. Ex. 33, R. 299; Gov. Ex. 34, R. 300; Gov. Ex. 39, R. 304) and procured from Heemsoth the licenses that had been issued to Western Commercial[4] (R. 64, 66). Reputable dealers, in selling platinum group metals, customarily made inquiries to ascertain that they were to be used in this country (R. 81); and in purchasing the rhodium and iridium petitioner did not state that a license had been issued for their exportation but represented that they were not being purchased for export (R. 77). He completed his purchase

[4] Gross and Western Commercial had never taken possession of the licenses, which had been delivered to Heemsoth; there was no attempt to assign them; and the State Department was not notified that Western Commercial did not intend to use them (R. 174).

of the metals on November 8 (R. 83, 84), and shipped them on November 19 by air express to Miami (Gov. Ex. 56, R. 325) and from there by Pan American Airways to Barth in Cali, Colombia (R. 109, 112), using the licenses of Western Commercial Company to clear the shipment at the port of exit (R. 104, Gov. Ex. 57, R. 326–328).[5] On the same day he advised Leukon A. G., by letter, of the shipment (Gov. Ex. 42, R. 308). The records of the Railway Express Agency and the airway bill stated that Western Commercial Company was the shipper (R. 109, 325), and the export declaration stated that the shipment was invoiced by Western Commercial (R. 326). Since the latter was the licensee, it was only by representing that the shipment was invoiced by Western Commercial that it was possible to clear it at the port of exit, where the licenses, which accompanied the shipment, were checked against the export declaration by the deputy collector of customs (R. 104). Heemsoth's firm prepared the shipping documents and charged Chemical Marketing Company $9.75 for its services (R. 307). The licenses were then returned to the Department of State (R. 105). The metals were received by Barth, who reshipped them via Santiago, Chile, to Europe, consigned to G. Siebert G. m. b. H. (Gov. Ex. 65–A, R. 334–335). Petitioner later referred to these shipping

[5] The files of the Office of Economic Warfare, which has succeeded to the State Department's functions in this respect, show that no application for an export license was made by either petitioner or Chemical Marketing Company and that no license was ever issued to either (R. 91).

methods as "a damned clever performance," and warned his German principals not to jeopardize their continuance by incautious cables (R. 336–337).

B. *The Mueller transaction.*—The circumstances upon which the second substantive and the second conspiracy indictment (R. 17–20) were predicated were designated by the court below as the "Mueller transaction." With funds supplied indirectly by Deutsche Gold und Silber Scheideanstalt (R. 221–222), petitioner bought 60 ounces of iridium in June 1940, representing that it was for domestic use (Gov. Ex. 69, R. 342; Gov. Exs. 70–A, 70–B, 70–C, R. 343–344). Pursuant to directions he mailed the metal to the German concern's transshipping agent in Japan (R. 156, Gov. Ex. 77, R. 345), but it was returned on January 22, 1941, with a notation that the import regulations of Japan did not permit its entry (R. 162, Gov. Ex. 92, R. 351; Gov. Ex. 93, R. 352). Thereafter he conducted negotiations with Barth, concerning ways and means to export the metal, which culminated in an attempt to export it to Mexico by having Western Commercial Company again apply for an export license (R. 166–171, 172–173; Gov. Ex. 95, R. 354–355; Gov. Ex. 96, R. 356; Gov. Ex. 97 and 97A, R. 357–358). An application for such a license was denied by the Department of State February 27, 1941, on the ground that the exportation would not be in the interest of national defense (Gov. Ex. 88, R. 349; Gov. Ex. 98, R. 362).

On the same day one Betty Mueller, of 1812 Cornelia Street, Brooklyn, bought a steamship ticket, costing $119.75 and covering passage to Spain on the S. S. Magallanes sailing March 26 (Gov. Ex. 109, R. 377). The government witness Krist, petitioner's secretary (R. 39–40), identified two documents which petitioner had given her in June 1942, and which until then he had kept at his home, apart from his office files (R. 159). One was a notation that Betty Mueller was sailing on the S. S. Magallanes, and the other was a written acknowledgement by her dated March 24, 1941, of receipt from the Chemical Marketing Company of 35 ounces of rhodium "for special delivery" (R. 212, Gov. Ex. 90, 350). In the meantime, on March 21, petitioner had paid to the Irving Trust Company an amount sufficient to release 35 of the 60 ounces of rhodium that he had pledged to it on January 25, 1941 (R. 192), and, likewise on March 21, he had debited Leukon A. G. for $250 expended in connection with rhodium (R. 225) and had sent a Swedish affiliate a debit memorandum to that effect (Gov. Ex. 87, R. 348), receipt of which was later acknowledged by Deutsche Gold und Silber Scheideanstalt (Gov. Ex. 104, R. 373). Betty Mueller sailed on the S. S. Magallanes on March 26 to Spain enroute to Germany, whence she subsequently wrote to the government witness Liebert (R. 204–205). No license to export the 35 ounces of rhodium had been obtained (R. 176–177). In June of 1942, when petitioner was called

upon by Murray, an Internal Revenue Agent, to explain his transactions in rhodium, entries were made on the books of Chemical Marketing Company, dated back to December 31, 1941, showing the shipment of the 35 ounces to Leukon A. G. on March 24, 1941, and debiting it with the price thereof (R. 224–225). At the same time, in June of 1942, petitioner executed an affidavit stating that Betty Mueller had "identified herself with a letter of G. Siebert, which communication requested her to call on the corporation [Chemical Marketing] and to collect from the corporation the thirty-five ounces of Rhodium metal," which were delivered to her on March 24, 1941 (R. 212, Gov. Ex. 93, R. 352–353).

ARGUMENT

I

Petitioner contends (Pet. 13) that, under Section 6 of the Act of July 2, 1940 (*supra,* pp. 2–3) and the regulations issued thereunder (*supra,* pp. 4–5), the issuance of an export license is tantamount to a determination that the metals authorized thereby to be exported are not essential for national defense, and that therefore "the subsequent act of exportation cannot reasonably be construed as a violation of the Law, no matter who participates therein." The purport of the argument is that falsification of the identity of the licensee and of the destination of the commodities is irrelevant and therefore not a violation of

the Act. But the Act and the regulations were not intended to do so vain a thing as to make the issuance of a license conclusive disproof of the need of one. The purpose of the Act was not to prohibit altogether the exportation of materials covered by it, but to allow their exportation only under circumstances compatible, in the judgment of the President, with the interests of national defense. It is well known that the defense legislation, enacted between the outbreak of war in Europe and Pearl Harbor, was not motivated by fear of the world at large and was not intended to preclude trade with all foreign nations. There is, therefore, no basis for petitioner's contention that, under the Act of July 2, 1940, the President has no power "to consider, as the basis for any determination, the nature of the shipper or the ultimate destination of the materials" (Pet. 12). Such factors are clearly within the standard of delegation; and the delegation is clearly valid. *United States* v. *Curtiss-Wright Export Corporation,* 299 U. S. 304.

II

Petitioner does not challenge the sufficiency of the evidence to establish the Barth transaction, but contends (Pet. 15–19) that his admissions respecting the Mueller transaction were not sufficiently corroborated. In so doing he treats as admissions the entries in the account books of the Chemical Marketing Company (Pet. 15). But these were

admissible in evidence as business entries in the books of the corporation, rather than as admissions by petitioner. Mrs. Mueller's receipt for the rhodium, and the paper previously in petitioner's possession showing his knowledge that she was sailing on the S. S. Magallanes, were independently proved by the witness Krist (R. 159). The fact that she sailed as planned, and reached Germany, was likewise independently proved (*supra,* p. 12). Wholly apart, therefore, from the admissions contained in petitioner's affidavit given Murray in June 1942 (R. 352–353), the evidence was amply sufficient to prove the exportation by petitioner of the 35 ounces of rhodium without an export license, and left nothing for conjecture, presumption, or surmise. It follows that the question of the extent to which an admission, made after the commission of the crime but prior to the time the accused has been charged therewith, requires corroboration, cf. *Warszower* v. *United States,* 312 U. S. 342, 347, is not presented by this case. For, as the court below found after a detailed review of the evidence (R. 426–427), irrespective of the rule followed, there was ample collaboration here. Indeed, it is the admissions that are corroborative of other evidence independently sufficient to sustain the verdict under the Mueller indictments.

Petitioner also contends (Pet. 14–15, 19–21), with respect to both of the conspiracy indictments, that the evidence fails to show that he conspired

with anyone. We submit that the evidence set forth in the Statement (*supra*, pp. 7–13) amply shows that in connection with the Barth transaction he conspired with Barth, with Heemsoth,[6] and with his foreign principals; and that, in connection with the Mueller transaction, he conspired with Mrs. Mueller and his foreign principals.[7]

CONCLUSION

Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants further review. It is therefore respectfully submitted that the petition should be denied.

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Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

EDWARD G. JENNINGS,
Special Assistant to the Attorney General.

IRVING S. SHAPIRO,
Attorney.

MARCH 1944.

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[6] Petitioner is clearly in error in stating (Pet. 14) that Heemsoth's only connection with the Barth transaction was the procuring of the export licenses. See pages 8–10, *supra*, in the Statement.

[7] Petitioner does not contend that there was but a single conspiracy of which both the Barth and Mueller transactions were in furtherance. Prior to February 27, 1941, the only conspiracy shown by the evidence was one to export metals under export licenses issued in the name of another; on February 27, 1941, or soon thereafter, a second conspiracy was formed to export metals by personal messenger.

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